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U.S. COURT OF APPEALS

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

	) No. 98-35668
PAUL MAY,	)
	) D.C. No. CV-97-01177-OMP
Plaintiff-Appellant,	)
	)
v.	) MEMORANDUM[1]
	)
NORM HAND; YAMHILL COUNTY, an Oregon Municipal entity,	)
	)
Defendants-Appellees.	)
	)

[1]This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Cir. R. 36-3.

Appeal from the United States District Court
for the District of Oregon

Owen M. Panner, Senior District Judge, Presiding

Submitted July 16, 1999
Portland, Oregon

Before: B. FLETCHER, GOODWIN, and TASHIMA, Circuit Judges.

Paul May, the Appellant, was terminated from his position as a captain with the Yamhill County Sheriff's Office ("YCSO") after running as a candidate for the office of Yamhill County Sheriff and losing the election to Norm Hand. On February 20, 1997, the new sheriff informed May that he was reorganizing the YCSO, and that his position was being eliminated effective March 31. After some negotiation, May agreed to accept a position as a corrections officer with the County, while expressly reserving his right to challenge his termination. May filed suit in federal district court and the district court granted summary judgment in favor of Defendants on all but one claim and a jury ruled in favor of the Defendants in the remaining claim. On appeal, May claims that his termination violated the First Amendment and the Due Process Clause[2] and that the district court erred with respect to a number of evidentiary rulings. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review

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[2]May also raises a breach of contract claim which turns on the same analysis of "just cause" protections as his due process claim.

the district court's grant of summary judgment de novo. *See Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir. 1998).

As a matter of law, the district court did not err in holding that the undisputed duties exercised by May made him a "policymaker". The Supreme Court has made it clear that the First Amendment will not protect all public employees from the whims of political patronage. In two cases, *Elrod v. Burns*, 427 U.S. 347, 366-7 (1976), and *Branti v. Finkel*, 445 U.S. 507, 517 (1980), the Court made it clear that public employees who qualify as "policymakers" may be terminated for political reasons without violating the First Amendment.[3] The essential inquiry is "not whether the label 'policymaker' or 'confidential' fits a particular

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[3]Although the discharged employees in both *Elrod* and *Branti* were fired because of their political affiliations, this court has extended the *Elrod-Branti* exception to "political loyalty" cases where an employee runs against his supervisor. *See Fazio v. City and County of San Francisco*, 125 F.3d 1328, 1332 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1517 (1998); *Finkelstein v. Bergna*, 924 F.2d 1449, 1451 (9th Cir. 1991) (terminated deputy district attorney ran against his supervisor's chosen successor); *Thomas v. Carpenter*, 881 F.2d 828, 831 (9th Cir. 1989) (applying *Elrod-Branti* analysis where a sheriff retaliated against his lieutenant for running against him); *accord Jenkins v. Medford*, 119 F.3d 1156, 1160 (4th Cir. 1997) (en banc) (applying *Elrod-Branti* analysis where sheriff's deputies dismissed after supporting sheriff's opponent), *cert. denied*, 118 S. Ct. 881 (1998).

position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518.

The Ninth Circuit has elaborated on the Supreme court's standard and held that "some factors to be considered when determining whether a job is a policymaking position are: vague and broad responsibilities, relative pay, technical competence, power to control others, authority to speak in the name of the policymakers, public perception, influence on programs, contact with elected officials, and responsiveness to partisan politics and political leaders." *Fazio v City and County of San Francisco*, 125 F.3d 1328, 1334 (9th Cir. 1997). The Ninth Circuit has held that even a private attorney who participated in strategy sessions, held privileged personnel meetings and represented a municipality in public settings was a policymaker. *Biggs v. Best, Best & Krieger*, 189 F.3d 989, 997 (9th Cir. 1999).[4]

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[4]A number of other circuits have found that deputy sheriffs had sufficient autonomy and proximity to the sheriff's role to be policymakers. *Jenkins v. Medford*, 119 F.3d 1156, 1164 (4th Cir. 1997) (sheriff may dismiss deputies either because of party affiliation or campaign activity because either "serves as a proxy for loyalty to the sheriff"); *Upton v. Thompson*, 930 F.2d 1209, 1215-17 (7th Cir. 1991) (discussing cases treating loyalty as a crucial qualification for sheriff's deputies); *Terry v. Cook*, 866 F.2d 373, 377 (11th Cir. 1989) (holding that the "loyalty to the individual sheriff and the goals and policies he seeks to implement" is

In this case, May was one of three YCSO captains, a position only one step removed from the sheriff. May was responsible for the training and supervision of 24 YCSO employees, contributed to discussions regarding management and policy, and represented the Sheriff before the Board of Commissioners and in the Community. May also attended regular executive meetings with the sheriff and key personnel, was responsible for grant administration and represented the Sheriff's Office in labor grievances. On the basis of these undisputed facts regarding May's duties, the district court did not err in holding that May was a "policymaker" within the meaning of the *Elrod-Branti* exception. Therefore, May could be dismissed for his political activities by Sheriff Hand without running afoul of the First Amendment.

May also appeals the district court's summary judgment denial of his due process claim. May claims that his termination deprived him of a property interest without adequate procedural due process.

In the employment context, as a general matter, a property interest protected by the Due Process Clause will be found where an employee cannot be terminated except for "just cause." *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). Employees who enjoy "just cause" protections are entitled to pretermination notice and hearing. *See id.* at 542. Under Oregon law, absent a statute, rule, regulation, or contractual term to the contrary, sheriff's deputies are "at will" employees. *See* O.R.S. §

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an appropriate requirement for deputies).

204.601(2); O.R.S. § 204.635(1); *Lawson v. Umatilla County*, 139 F.3d 690, 692 (9th Cir. 1998). The Oregon Supreme court, however, has recognized that this "at will" status can be modified by counties by the adoption of personnel rules creating due process or "just cause" requirements. *See Graves v. Arnado*, 768 P.2d 910, 912 (Or. 1989).

May argues that he enjoyed "just cause" protections as a YCSO captain, pointing to a Yamhill county policy known as Board Order 88-96, which provides for notification of charges in writing and the opportunity to respond to charges. The policy on its face is replete with procedural protections, although it does not specifically include "just cause" language. May introduced testimony from the County Personnel Officers suggesting that the County viewed Board Order 88-96 as continuing the prior County policy, which expressly extended "just cause" protections to employees like May. Be that as it may, even if May were a "just cause" employee for some purposes, the most that he would be entitled to under the circumstances of his termination was to show in a pretermination hearing that he was not a "policymaker". Since we find, as a matter of law, that May was a "policymaker" this question has been heard and resolved.

May also challenges several of the district court's rulings handed down during the trial of his promotional opportunities claims. The district court's evidentiary rulings are reviewed for an abuse of discretion. *See Fireman's Fund Ins. v. Alaskan Pride Partnership*, 106 F.3d 1465, 1467 (9th Cir. 1997). Erroneous rulings will support a new trial only where

they are not harmless. *See id.* The formulation of jury instructions is reviewed for an abuse of discretion, as are responses to jury inquiries. *See id.* at 1469; *United States v. Amlani*, 111 F.3d 705, 716 (9th Cir. 1997). In a civil case, however, we may not review a jury instruction unless the aggrieved party raised an objection below. *See Larez v. City of Los Angeles*, 946 F.2d 630, 638 (9th Cir. 1991).

The district court excluded the testimony of Tammi McLaughlin, who was prepared to testify that Sheriff Hand questioned her during an interview regarding her loyalty to May. The district court ruled that this evidence, although marginally relevant, would be substantially more prejudicial than probative. *See* Fed. R. Evid. 403. Having reviewed the record, we conclude the district court did not abuse its discretion. In any event, even if erroneous, the error would appear to be harmless, as it does not appear that this testimony was central to May's claim.

May also challenges the district court's ruling excluding evidence regarding Sheriff Hand's treatment of Larry Hailey. The district court based this ruling on the fact that Hailey's claims had not survived summary judgment and that the treatment of Hailey should not be admitted to show unfair treatment of May. May opposed this evidentiary ruling only insofar as it would have prevented him from putting Hailey on the stand to testify regarding statements that Sheriff Hand made regarding May. Notwithstanding the district court's ruling, May put Hailey on the stand and had the opportunity to put this evidence before the Jury. May has not identified any additional testimony that he was unable to introduce, and thus has not demonstrated

that the district court's ruling constituted an abuse of discretion.

The third challenged evidentiary ruling relates to the exclusion of an expert witness, retired Corrections Supervisor Hostetler, who was prepared to testify that employing a former captain as a corrections officer was "demeaning." The district court ruled that this testimony, even if marginally relevant, was substantially more prejudicial than probative. *See* Fed. R. Evid. 403. Because the claims tried ran to the denial of promotions, rather than to May's being offered the position as a corrections officer, it does not appear that the district court abused its discretion in excluding this evidence.

The fourth evidentiary ruling that May challenges relates to the exclusion of evidence regarding a conversation between Sheriff Hand and County Commissioner Thomas Bunn. May sought to introduce testimony suggesting that Sheriff Hand was initially opposed to offering May even the corrections officer position, and that he did not capitulate until two county commissioners came to May's defense. This evidence was not directly relevant to his treatment in connection with later promotional opportunities. Therefore, the district court did not abuse its discretion in excluding the testimony.

Finally, May challenges the district court's response to two jury inquiries. After retiring to deliberate, the jury sent out two questions. In response, the district court reinstructed the jury regarding the fact that May's termination was proper and not before them. To the extent May challenges

this instruction as erroneous, we are precluded from reaching the question because May failed to object to the instruction before the district court. *See Larez*, 946 F.2d at 638. In fact, after hearing the court's proposed response, May's counsel expressly stated, "No objection."

May also relies on the jury's questions to demonstrate the prejudice that he claims resulted from the erroneous evidentiary rulings. We are not persuaded by this argument. If anything, the jury questions indicate that, despite the court's instructions, the jury was considering the circumstances surrounding May's termination in ruling on the promotions claim. If anything, the error in instructing the jury appears to have redounded to May's benefit, as the jurors were apparently considering the possibility that his termination might have raised an inference of retaliation.

At root, May argues that the grant of summary judgment as to his termination claims prejudiced his ability to put on his case on the denial of promotional opportunities. We disagree. His promotional opportunities claims were legally separable from his termination claims, and, having reviewed the record, we are satisfied that the bifurcation of this case (resulting from the partial grant of summary judgment) did not substantially prejudice his ability to litigate the promotional opportunities issues.

For the reasons discussed above, we AFFIRM.

FILED
March 24, 2000

Cathy A. Catterson, Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

	) No. 98-35668
PAUL MAY,	)
	) D.C. No. CV-97-01177-OMP
Plaintiff-Appellant,	)
	)
v.	) ORDER
	)
NORM HAND, YAMHILL COUNTY, an Oregon Municipal entity,	)
	)
Defendants-Appellees.	)
	)

Before: GOODWIN, B. FLETCHER AND TASHIMA, Circuit Judges

The panel has voted unanimously to deny the petition for rehearing. Judge Tashima voted to deny the petition for rehearing en banc and Judges Goodwin and B. Fletcher so recommended.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the petition for rehearing en banc is rejected.

FILED

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CLERK, U.S. DISTRICT COURT
DISTRICT OF OREGON
PORTLAND, OREGON
BY _____

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PAUL MAY,	)	
	)	
Plaintiff,	)	CV 97-1177-PA
	)	
v.	)	
	)	
NORM HAND and YAMHILL COUNTY, an Oregon Municipal entity,	)	OPINION
	)	
Defendants.	)	

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Plaintiffs Paul May and Larry Hailey bring these actions against defendants Yamhill County and Yamhill County Sheriff Norm Hand. Plaintiffs, former captains in the Yamhill County Sheriff's Office (YCSO), contend that defendants violated their constitutional rights by eliminating their positions because of their political opposition to Hand. Defendants move for summary judgment in each case. I grant the motion in its entirety in the Hailey case. The motion in the May case is granted in part and denied in part.

BACKGROUND

In the fall of 1996, May and Hailey held two of three captain positions in the YCSO. May ran for Sheriff against defendant Norm Hand in a November 1996 election. Hailey supported May. Hand won and assumed office in January 1997.

Hand restructured the YCSO. He eliminated May's and Hailey's captain positions and created the new position of undersheriff. Immediately thereafter, both plaintiffs began working as corrections deputies where they remain employed.

STANDARDS

The court should grant summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of

law. Fed R. Civ. P. 56(c). If the moving party shows that there are no genuine issues of material fact, the nonmoving party must go beyond the pleadings and designate facts showing an issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). A scintilla of evidence, or evidence that is merely colorable or not significantly probative, does not present a genuine issue of material fact. United Steelworkers of Am. v. Phelps Dodge Corp., 856 F.2d 1539, 1542 (9th Cir.), cert denied, 493 U.S. 809 (1989).

The substantive law governing a claim determines whether a fact is material. T. W. Elec. Serv. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). The court should resolve reasonable doubts about the existence of a material factual issue against the moving party. Id. at 631. The court should view inferences drawn from the facts in the light most favorable to the nonmoving party. Id. at 630-31.

DISCUSSION

I. First Amendment Claims - Elimination of Captain Positions

Plaintiffs contend that Hand eliminated their captain positions because of their political opposition to Hand in the sheriff's election. Defendants argue that plaintiffs occupied policymaking positions, termination of which may be politically motivated.

Generally, a public employee's claim for violation of his or her First Amendment rights is analyzed under Pickering v. Board of Educ., 391 U.S.

563 (1968). However, a different analysis applies for "policymaking" employees. Branti v. Finkel, 445 U.S. 507, 517 (1980); Elrod v. Burns, 427 U.S. 347, 372 (1976). Under Elrod-Branti, elected administrators have discretion to consider political affiliation in filling high-level confidential policymaking positions. Id.; Lumpkin v. Brown, 109 F.3d 1498, 1501 (9th Cir. 1997).

A number of courts, including Magistrate Judge Jelderks for this court, have concluded that Elrod-Branti applies to relationships between sheriffs and their deputies. See, e.g., Jenkins v. Medford, 119 F.3d 1156, 1164 (4th Cir. 1997) (en bank) (office of deputy sheriff was that of a policymaker and was the alter ego of the sheriff; Elrod-Branti applied), cert. denied, 118 S. Ct. 881 (1998); Slyter v. Noelle, No. CV-96-783-JE, Opinion at 11-13 (D. Or. June 27, 1997) (new Multnomah County Sheriff's elimination of chief deputy sheriff's position did not violate First Amendment under Elrod-Branti).

Plaintiffs argue that Elrod-Branti applies only to at-will employees which, according to plaintiffs, they were not. I do not reach this argument because, as discussed below in connection with the procedural due process claims, I conclude that plaintiffs are at-will employees. Plaintiffs also argue that Hand is not entitled to summary judgment because Elrod-Branti applies only to the "hiring authority" which, they maintain, Hand was not because all hiring decisions in Yamhill County are made by the Board of County Commissioners.

As support for this argument, plaintiffs rely on a single passage from Branti in which the court was

discussing the nature of a "policymaker." Branti, 445 U.S. at 518. Plaintiffs cite no cases, and I have found none, holding that Elrod-Branti applies only to the person or public body actually executing the personnel decision as opposed to the person or public body making the recommendation for that decision. Without additional authority, I reject plaintiffs' argument.

Assuming *arguendo* that Hand's elimination of the captain positions was politically motivated, defendants argue that plaintiffs occupied policymaking positions which could be eliminated for political reasons without violating the First Amendment. In his position as Support Services Captain, May was responsible for a broad range of activities within the YCSO. He appeared before the Board of County Commissioners on a variety of matters. He was ultimately responsible for the development and implementation of a policy manual. He supervised approximately twenty-four regular employees and volunteers, including sergeants. He had authority to discipline anyone in his division. He represented the YCSO in all labor grievance matters. The only higher ranking person in the YCSO was the Sheriff himself.

In his position as Field Operations Captain, Hailey had a variety of high level functions within the department. He was responsible for the administration and supervision of all functions within the operations division. He regularly met with the Sheriff and the other two captains to discuss management and policy issues. He supervised approximately forty-five people and had full authority to discipline members, including sergeants. He

frequently represented the sheriff before county commissioners and in the community. The only higher ranking person in the YCSO was the Sheriff himself.

As the Ninth Circuit recently noted, the term "policymaker" "does not mean 'one who makes policy[]' . . . but refers to a position in which political considerations are 'appropriate requirement[s] for the effective performance of the public office involved.'" Fazio v. City and County of San Francisco, 125 F.3d 1328, 1333 (9th Cir. 1997) (quoting Branti, 445 U.S. at 519), cert. denied, 1998 WL 73024 (U.S. Apr. 20, 1998). Factors to consider when determining whether a position is a "policymaking" one include "'vague or broad responsibilities, relative pay, technical competence, power to control others, authority to speak in the name of policymakers, public perception, influence on programs, contact with elected officials, and responsiveness to partisan politics and political leaders.'" Id. (quoting Hall v. Ford, 856 F.2d 255, 262 (D.C. Cir. 1988)).

Plaintiffs do not challenge defendants' factual assertions about the positions' duties and I reject plaintiffs' argument that Yamhill County cannot have any policymaking positions because it prohibits employees from engaging in political activity on the job. The cases make clear that determination of a "policymaker" is a functional analysis examining the duties of the position; engagement in political activity is not dispositive.

Under the undisputed facts, plaintiffs' captain positions were "policymaking" positions as that term is

defined in Fazio. I grant defendants' motions on these First Amendment claims.

II. Due Process Claims

Although plaintiffs raise both substantive and procedural due process claims, the substantive due process claims are equivalent to the First Amendment claims discussed above and need no separate analysis. See, Armendariz v. Penman, 75 F.3d 1311, 1325 (9th Cir. 1996) (en banc) (scope of substantive due process does not extend to circumstances already addressed by other constitutional provisions).

"A government employee is not entitled to due process based on deprivation of property, when removed from a position, unless the employee has a 'legitimate claim of entitlement' to the position." Weisbuch v. County of Los Angeles, 119 F.3d 778, 780 (9th Cir. 1997) (quoting Board of Regents v. Roth, 408 U.S. 564, 577 (1972)). "To determine whether an entitlement exists, a court looks to 'existing rules and understandings that stem form an outside source such as state law." Federal Deposit Ins. Corp. v. Henderson, 940 F.2d 465, 475 (9th Cir 1991) (quoting Roth, 408 U.S. at 577.

Oregon statutes create at-will employment relationships for county sheriff's deputies. See, Or. Rev. Stat. (ORS) 204.601(2) (county deputies and employees paid from county funds hold office during the pleasure of the appointing officer); ORS 204.635(1) ("sheriff's deputies shall be appointed by the sheriff in writing and continue during the pleasure of the sheriff."). However, county personnel policies may,

consistent with ORS 204.601 and ORS 204.635, impose conditions of "just cause" on a sheriff's authority to terminate the employment of deputy sheriffs. Graves v. Amado, 307 Or. 358, 360, 768 P.2d 910, 911 (1989). The parties dispute whether Yamhill county's personnel policies create a just cause dismissal standard.

The county's 1988 personnel policies, the operative policies in this case, contain no "just cause" language. Those policies state that "[e]mployees outside the county's bargaining units may be disciplined or discharged for failure to fulfill their responsibilities as employees. . . . ." Defts' Exh. A to Mikami Affid.

Defendants argue that the 1988 personnel policies contain no "cause" type language required to create a protected property interest. I agree. A "failure to fulfill his or her duties" discipline or termination standard is too broad and amorphous to be considered "just cause."

In addition, even if the 1988 personnel policies contained the express "just cause" words, a recent Ninth Circuit case indicates that there is no protected property right because of a disclaimer in the 1989 employee handbook. In Lawson v. Umatilla County, Nos. 96-36060, 97-356634, 1998 WL 117866 (9th Cir. Mar. 18, 1998), the court held that because the defendant's personnel policies contained a disclaimer stating that the policies did not create a contract, the plaintiff did not, under Oregon law, possess a property interest in continued employment, despite the fact that the personnel policies also limited the grounds for

discipline or discharge to "cause." Id. at *3. The employee handbook in this case contains a similar disclaimer. Defts' Exh. B to Mikami Affid.

Here, evidence supports construing the employee handbook as a supplement to the 1988 personnel policies. See Defts' Exh. 4 (Mikami Affid.) at 2 (stating that the employee handbook "supplements the [County's] Policy and Procedure Manual"); Defts' Exh. C to Mikami Affid. (handbook itself states that it is intended to serve as "guidelines regarding county policy, procedure, ..."). So construed, Lawson holds that the disclaimer negates any "cause" language contained in the 1988 personnel policies.

Plaintiffs argue that a just cause standard exists because (1) there is a history of a just cause standard in Yamhill County; (2) promises of a just cause standard were made to May; and (3) Oregon Revised Statutes create a just cause standard for police officers. I reject these arguments for the following reasons.

The history of county policy does not create a material issue of fact as to whether a "just cause" standard existed at the time the captain positions were eliminated. First, what Vasquez learned from county Counsel in 1979 has no bearing on the current policies. Second, Mikami's testimony that in practice, Yamhill County applies a just cause standard to nonbargaining unit employees is not relevant because first, he admits that he is unaware of any nonbargaining unit employee getting very far in the disciplinary process and thus, he has had no opportunity to apply any standard to such employees, and second, his understanding of a practice cannot contradict the clear

language of the policies.

Third, Krawczyk admits that the 1988 personnel policies were intended to replace the previous policies. As noted above, there is no just cause language in the 1988 policies. Whether Krawczyk intended to eliminate the previous policy's just cause provision is irrelevant in the face of the unambiguous language of the 1988 policies. Fourth, the 1995 YCSO policies expressly state that county policies are only to provide additional information, consistent with the county's policies. Moreover, although the word "cause" is used to describe the possible bases for discipline, it is not a "just cause" standard. Rather, the wording is broad, with the only limit to the definition of "cause" being the Sheriff's or a supervisor's imagination.

As to promises made to May, evidence suggests that any such promises were made only in regard to retirement benefits in the wake of Ballot measure 8 prohibiting public employers from continuing to make the employee "pick-up" contribution to the public employee retirement system. See, e.g., Pltfs' Exh. N (Lopuszynski Depo.) at 5 (benefits only example of effort to treat non-bargaining unit and bargaining unit staff alike); Pltfs' Exh. 4 to Hailey Affid. (document indicating that Yamhill county to treat bargaining unit and nonbargaining unit staff alike expressly states that it relates solely to the retirement system contribution as a result of Ballot Measure 8).

Additionally, even if such a promise were made to May, and somehow this carried over to Hailey as well, it would have been made without authority and

cannot bind Yamhill County. See, e.g., Butler v. Portland Gen. Elec. Co., 748 F. Supp. 783, 792-93 (D. Or. 1990) (Judge Frye noting that an implied contract containing a just cause standard cannot be created by mere casual or unauthorized comments), aff'd, 958 F.2d 377 (9th Cir. 1992); Holdner v. Columbia County, 123 Or. App. 48, 51-52, 858 P.2d 901, 902 (1993) (rejecting plaintiff's argument that county commissioner had apparent authority to bind county to promise made to plaintiff by county commissioner.)

Finally, the statute creating a just cause standard for police officers is irrelevant in this case because it does not apply to supervisory employees like plaintiffs and does not apply when a county has adopted its own personnel policies. ORS 236.370(3) and (6).

I grant defendants' motions on the due process claims.

III. Breach of Contract Claims

Plaintiffs allege that defendants breached their employment contracts by terminating them without just cause. For the reasons stated in the previous section, I grant summary judgment to defendants on these claims because there was no just cause provision in the applicable employment policies.

IV. Age Discrimination - Elimination of Captain Positions

Plaintiffs contend that their captain positions were eliminated because of their age. To establish the

requisite inference of age discrimination under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, plaintiffs must show that: (1) they were members of the protected class; (2) they were performing their jobs in a satisfactory manner; (3) they were terminated; and (4) they were replaced by a substantially younger employee with equal or inferior qualifications. Wallis v. J.R. Simplot Co., 26 F.3d 885, 891 (9th Cir. 1994).

At the time the captain positions were eliminated, May was forty years old and Hailey was forty-eight. I assume for the purposes of this motion that they were satisfactorily performing their jobs and that they were terminated. May's duties were assumed by Sheriff Hand and Sergeant Kowalik, both of whom are older than May. Hailey's duties were assumed by Sheriff Hand, who is older than Hailey, and to some extent by Curt Gilbert, who is forty-four years old. Although Gilbert is younger than Hailey, he is not substantially younger. Thus, plaintiffs fail to establish prima facie cases.

Even if plaintiffs could establish prima facie cases, I would still grant summary judgment to defendants on the ADEA claims because plaintiffs fail to create a genuine issue of material fact regarding pretext. Defendants argue that the captain positions were eliminated because of Hand's departmental reorganization. To survive summary judgment, plaintiff must provide enough evidence so that a reasonable factfinder could conclude that this asserted justification is pretextual. See, e.g., Nidds v. Schindler Elevator Corp., 113 F.3d 912, 918 (9th Cir. 1996) (to survive summary judgment, plaintiff must produce

enough evidence to allow a reasonable factfinder to conclude that the alleged reason for the plaintiff's discharge is false or that the true reason was a discriminatory one), cert. denied, 118 S. Ct. 369 (1997). Plaintiffs fail to do so.

The evidence shows that in January and February 1997, Hand conducted a "perception audit" of the sheriff's department to assess the feelings of employees. Detective Larry Pedersbeck made a written statement indicating dissatisfaction by "front line supervisors" regarding older employees being promoted over them. Pltfs' Memo. at 26. Plaintiffs also rely on testimony from Krawczyk that Hand was critical of Hailey's "authoritarian style of management" as causing "erosion of morale." Pltfs' Exh. F at 9.

A reasonable factfinder could not find the requisite pretext from this evidence. The statements are about only Hailey, not May. The statement made by Hand to Krawczyk about Hailey mentions nothing about age and does not establish that Hand relied upon any information from his front line supervisors. At best, it shows that Hand had a belief about Hailey's management style which could have been formed from Hand's own observations of Hailey or from any number of other ways. Finally, even if front line supervisors passed information to Hand, there is no evidence any of them communicated any feelings about age or older workers to Hand. Thus, plaintiffs fail to create a genuine issue of material fact regarding age being a factor in Hand's decision to eliminate the captain positions. I grant summary judgment to defendants on these age discrimination claims.

V. May's Promotional Opportunities

May contends that defendants denied him several promotional opportunities because of his age and in retaliation for his political opposition to Hand. As to the First Amendment retaliation claim, defendants argue Elrod-Branti allows them to consider May's political opposition to Hand in filling job vacancies. Although Elrod-Branti applies to decisions concerning promotions, as to lower-level public employment positions, "promotions [or lack thereof] . . . based on political affiliation or support are an impermissible infringement on the First Amendment rights of public employees." Rutan v. Republican Party of Ill., 497 U.S. 62, 74-75 (1990). Defendants fail to show that any of the promotional opportunity positions at issue here are anything other than lower-level public employment positions for which the Elrod-Branti political patronage analysis is inapposite.

If Elrod-Branti does not apply, then Pickering does. Here, May's political opposition to Hand is a matter of public concern. See Thomas v. Carpenter, 881 F.2d 828, 830 (9th Cir. 1989) (statements made in context of sheriff election were addressed to matter of public concern). Defendants fail to show that May's placement in one of these positions would impair discipline or co-worker harmony, disrupt the workplace, or "have a detrimental impact on close working relationships for which personal loyalty and confidence are necessary[.]" Wheaton v. Webb-Petett, 931 F.2d 613, 618 (9th Cir. 1991). Thus, as to the First Amendment component of these claims, the only issue remaining is whether May was denied the positions because of his political opposition to Hand.

The positions at issue are several temporary corrections sergeant positions, two patrol deputy positions, an assignment for disaster relief in North Dakota, and a patrol deputy position assigned to the Grand Ronde Tribe. May presents no evidence supporting an age discrimination claim for any of these positions. As to the First Amendment claim, however, May states that on the day Hand told him that his captain position was to be eliminated, Hand also told him he was filing an elections complaint against him. May also states that County Commissioner Tom Bunn told him that the elimination of the captain positions was not about money as Hand had asserted and that Hand did not want May and Hailey in the sheriff's organization.

With the exception of the temporary corrections sergeant positions requiring one year of corrections experience and the patrol deputy position for which plaintiff did not score in the top ten of the applicant test, May's evidence is sufficient to create a jury issue as to whether defendants' failure to place him in any of the other positions was in retaliation for May's political opposition to Hand. Defendants argue that because several months passed between the November 1996 election and May's failure to obtain any of these positions, the evidence is insufficient to show retaliation. I disagree. While the lapse of time may go to the weight of the evidence, it does not disprove a retaliatory motive. I grant summary judgment to defendants on the age discrimination components of these claims and on the First Amendment components of the patrol deputy position in which plaintiff did not make the top ten and the temporary corrections sergeant positions requiring one

year of corrections experience. I deny the motion as to the other claims.

CONCLUSION

Defendants' motion in the Hailey case, No. CV-97-1712-PA, (#17) is granted. Defendants' motion in the May case, No. CV-97-1177-PA (#34) is granted in part and denied in part as follows: the motion is granted in all respects except for the following promotional opportunities: the May 1997 temporary corrections sergeant positions (First Amendment basis only); temporary patrol deputy position filled by reserve deputy (First Amendment basis only); disaster relief project in North Dakota (First Amendment basis only); and patrol deputy position for Grand Ronde Tribe (First Amendment basis only).

DATED this 12th day of May, 1998.

s/ Owen M. Panner
OWEN M. PANNER
U.S. DISTRICT COURT JUDGE

FILED

1998 May 12 A 11:35
CLERK, U.S. DISTRICT COURT
DISTRICT OF OREGON
PORTLAND, OREGON
BY _____

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PAUL MAY,	)	
	)	
Plaintiff,	)	CV 97-1177-PA
	)	
v.	)	
	)	
NORM HAND and YAMHILL	)	
COUNTY, an Oregon	)	ORDER
Municipal entity,	)	
	)	
Defendants.	)	

Defendants' motion for summary judgment (#34) is granted in part and denied in part as follows: the motion is granted in all respects except for the following promotional opportunities: the May 1997 temporary corrections sergeant positions (First Amendment basis only); temporary patrol deputy position filled by reserve deputy (First Amendment basis only); disaster relief project in North Dakota (First Amendment basis only); and patrol deputy position for Grand Ronde Tribe (First Amendment basis only).

DATED this 12th day of May, 1998.

s/ Owen M. Panner
OWEN M. PANNER
U.S. DISTRICT COURT JUDGE

Entered on the Docket on
6/18/98
DONALD M. CINNAMOND
By mjs

FILED mjs

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CLERK, U.S. DISTRICT COURT
DISTRICT COURT OF OREGON
PORTLAND, OREGON
BY mjs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PAUL MAY,	)	
	)	
Plaintiff,	)	CV 97-1177-PA
	)	
v.	)	
	)	
NORM HAND and YAMHILL COUNTY, an Oregon municipal entity,	)	**JUDGMENT OF DISMISSAL**
	)	
Defendants.	)	

PANNER, J.

Based upon the record, this action is dismissed.

DATED this 15th day of June, 1998.

s/ Owen M. Panner
OWEN M. PANNER
U.S. DISTRICT COURT JUDGE

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